Supreme Court, U. S.
FILED
NOV 24 1976
MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

Nos. 76-331, 76-332, 76-336

NORTH CAROLINA UTILITIES COMMISSION, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

THE UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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JOINT BRIEF IN OPPOSITION FOR RESPONDENT-INTERVENORS

[Counsel listed on inside cover]

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON D. C. 20001

JOSEPH E. KELLER
WAYNE V. BLACK
LARRY S. SOLOMON
Keller & Heckman
1150 17th Street, N.W.
Washington, D.C. 20036

Counsel for American Petroleum Institute

J. ROGER WOLLENBERG
DAVID R. ANDERSON
NEIL J. KING
Wilmer, Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 20006

J. GORDON WALTER
Old Orchard Road
Armonk, New York 10504

Counsel for International Business Machines Corporation

HERBERT E. MARKS
STEPHEN R. BELL
Wilkinson, Cragun & Barker
1735 New York Avenue, N.W.
Washington, D.C. 20006

Counsel for Remote Processing Services Section of the Association of Data Processing Services Organizations, Inc. (ADAPSO)

EDWIN B. SPIEVACK
IAN D. VOLNER
Cohn & Marks
1920 L Street, N.W.
Washington, D.C. 20036

Counsel for Telerent Leasing Corporation, North American Telephone Association, et al.

JOSEPH M. KITTNER
EDWARD P. TAPTICH
McKenna, Wilkinson & Kittner
1150 17th Street, N.W.
Washington, D.C. 20036

JOHN S. VOORHEES
Howrey & Simon
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20036

Counsel for Computer and Business Equipment Manufacturers Association

MICHAEL H. BADER
KENNETH A. COX
WILLIAM J. BYRNES
Haley, Bader & Potts
1730 M Street, N.W.
Washington, D.C. 20036

Counsel for MCI Telecommunications Corporation

HERBERT E. FORREST
Steptoe & Johnson
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

THORMUND A. MILLER
RICHARD S. KOPF
7 Southern Pacific Building
One Market Plaza
San Francisco, Calif. 94105

Counsel for Southern Pacific Communications Company

CHARLES M. MEEHAN
Keller & Heckman
1150 17th Street, N.W.
Washington, D.C. 20036

Counsel for Utilities Telecommunications Council

November 24, 1976

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JOINT BRIEF IN OPPOSITION FOR RESPONDENT-INTERVENORS

QUESTION PRESENTED

Where the Federal Communications Commission, acting under the Communications Act of 1934, as amended, has validly required interstate communications common carriers to permit attachment of customer-provided terminal devices to interstate communications lines, may state regulatory commissions forbid such attachment to lines used for both interstate and intrastate communications?

STATEMENT OF THE CASE

This case has its genesis in a proposal by the North Carolina Utilities Commission to adopt a rule that in effect would have prohibited the attachment of customer-provided terminal equipment to the interstate telephone network if such equipment were also to be used for intrastate service. In a proceeding instituted in response to a petition by manufacturers and suppliers of terminal equipment, the implications of the North Carolina Utilities Commission proposal (and of actions of similar effect in Nebraska and Oklahoma) were carefully examined by the Federal Communications Commission (the "Commission" or "FCC"). The Commission, in a declaratory ruling, concluded that the "clear jurisdiction over interstate communications" vested in it by the Communications Act of 1934, as amended [1] (the "Act") required that it have "primacy in authority over the terms and conditions governing the interconnection of customer-provided equipment to the nationwide telephone network." [2] Although the Commission acknowledged that there was room for state action in the interconnection area consistent with federal requirements,[3] it determined

[1] 47 U.S.C. §§ 151 *et seq.*

[2] *Telerent Leasing Corp.*, 45 F.C.C.2d 204, 220 (1974), *aff'd sub nom. North Carolina Util. Comm'n* v. *FCC*, 537 F.2d 787 (4th Cir. 1976).

[3] *Id.* at 221. In this regard, the Commission stated:

> "Although we have asserted federal primacy in this area, it does not follow that the State commissions have no proper interest or that they are to be denied a participating role and thus become merely onlookers to purely unilateral action by the FCC." *Id.* at 220.

The Commission noted that states could fully exercise their powers to investigate the effects of interconnection on telephone service and could provide additional options for customers with respect to interconnection. Two states, California and New York, have already done so. *See Investigation on Interconnection*, Calif. Pub. Util.

[Footnote continued on page 3]

that states necessarily are foreclosed from taking action that would contravene—and make it impossible to effectuate—the interconnection policies adopted by the FCC for the regulation of interstate telephone service.[4]

This result, the Commission reasoned, was required by the practicalities of providing service over the nation's single, integrated telephone network—a system characterized by a "commonality of telephone company plant and facilities used to provide intrastate and interstate services and the indivisibility of such plant and facilities, . . ." [5] Because of this commonality and indivisibility of plant and facilities, the Commission found that if its jurisdiction were not recognized as paramount, telephone users would

> "be subjected to a melange of regulations determined by each of 50 separate jurisdictions, as to the terms and conditions upon which they shall have access to and use of the telephone network for interstate services." [6]

[3] [Continued]
Comm'n, Decision No. 85791 (Case No. 9625 May 11, 1976); *Rochester Tel. Corp.*, 12 N.Y. Pub. Serv. Comm'n 1590 (1972).

The Commission has involved the states in interconnection investigations. Thus, in 1972, the Commission convened a Federal-State Joint Board, pursuant to Section 410 of the Act, 47 U.S.C. § 410, to investigate the question whether customer-provided interconnection should be liberalized beyond that permitted by the *Carterfone* decision, 13 F.C.C.2d 420, *reconsideration denied*, 14 F.C.C.2d 571 (1968), and to make recommendations to the Commission based on its findings. *Proposals for New or Revised Classes of MTS and WATS*, 35 F.C.C.2d 539, 542 (1972). More recently, the Commission convened a Federal-State Joint Board to consider the impact of the use of customer-provided equipment on revenues received by local telephone companies through the separations/settlement process. 41 Fed. Reg. 50009 (November 12, 1976).

[4] 45 F.C.C.2d at 214.

[5] *Id.* at 218.

[6] *Id.* at 219.

Quoting from a decision of the District of Columbia Circuit, the Commission observed that "'fifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communication.'" [7]

The Fourth Circuit upheld the Commission's ruling on review.[8] In an opinion written by the late Judge Hastie,[9] the court rejected the contention that Section 2(b)(1) of the Act[10] (which reserves to the states jurisdiction over facilities used solely for intrastate communication) or Section 221(b)[11] (which deals with state jurisdiction over local telephone exchange service) deprives the Commission of authority to regulate facilities used jointly for interstate and intrastate service.[12] In so holding, the court observed that if state regulators could implement interconnection proposals that directly conflicted with FCC requirements in the area, the Commission would "be frustrated in the exercise of that plenary jurisdiction over the rendition of interstate and foreign

[7] *Id.* at 217 (quoting *General Tel. Co.* v. *FCC*, 413 F.2d 390, 401 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969)).

[8] *North Carolina Util. Comm'n* v. *FCC*, 537 F.2d 787 (4th Cir. 1976).

[9] Because the other Fourth Circuit judges recused themselves, the panel consisted of Judge Widener from the Fourth Circuit, Judge Hastie from the Third Circuit, and Judge Tuttle from the Fifth Circuit.

[10] 47 U.S.C. § 152(b)(1).

[11] 47 U.S.C. § 221(b).

[12] The court was unwilling to accept the contention that Section 2(b) "sanctions . . . state regulation, formally restrictive only of intrastate communication, that in effect encroaches substantially upon the Commission's authority . . . ." 537 F.2d at 793. Judge Widener, concurring in part and dissenting in part, did not differ from the majority regarding the effect of Section 2(b)(1); rather, he relied entirely on Section 221(b) for the view that the FCC does not have paramount jurisdiction over the interconnection of customer-provided equipment.

communication services that the Act has conferred upon it." [13] Accordingly, the court concluded that

> "the Commission's declaratory statement of its primary authority over the interconnection of terminal equipment with the national telephone network is a proper and reasonable assertion of jurisdiction conferred by the Act." [14]

Petitioners now ask this Court to review the carefully considered decision of the court below and to upset a consistent pattern of decisions recognizing the Commission's jurisdiction reaffirmed in the present case.

REASONS FOR DENYING THE WRIT

Petitioners claim that the Commission's assertion of authority in the declaratory ruling exceeded its jurisdiction. They contend that the declaratory ruling departs radically from an established pattern of regulation, thereby drastically altering the congressional distribution of

[13] *Id.*

[14] *Id.* at 794. In support of this conclusion, the court found significant the Commission's early and repeated exercise of jurisdiction over facilities used jointly for both interstate and intrastate communication service and Congress' inaction for some thirty years in the face of that exercise or jurisdiction. *Id.* at 794-95. Only recently, primarily at the behest of American Telephone & Telegraph Co., has Congress begun to consider the jurisdictional question presented in this case. Since March of this year, several bills have been introduced in Congress for the purpose of establishing "that the complete authority to regulate terminal and station equipment used for telephone exchange service shall rest with the States even though such terminal and station equipment also may be used in connection with interstate services." *See, e.g.*, S. 3192, 94th Cong., 2d Sess. (1976); H.R. 12323, 94th Cong., 2d Sess. (1976). Hearings have already been held before the Communications Subcommittee of the House Committee on Interstate and Foreign Commerce, and the groundwork has been laid for further consideration of the legislation, including more hearings in the 95th Congress. "Bell Telephone Presses Case for Monopoly," 34 *Cong. Q.* 2615 (September 25, 1976).

power between state and federal agencies. This entirely distorts the facts, the law and the effect of the Commission's ruling. On numerous occasions in the last forty years, the Commission has asserted the authority which it reaffirmed in the declaratory ruling, and state regulation in the interconnection area, to the extent it has existed, has deferred to that authority. Affirmance of this authority by the court below was consistent both with the history of FCC actions in the area and with the decisions of other federal and state courts that have been confronted with the issue. Petitioners thus do not present for review a question on which the law is unsettled.

Perhaps in recognition of this, petitioners rely on the fact that this case involves a large quantity of telephone equipment as to which the FCC's jurisdiction has been sustained.[15] But this fact is irrelevant to the meritoriousness of the Petitions for Certiorari. As shown below, the Fourth Circuit's decision is both consistent with well established administrative practice and judicial decisions and clearly correct as a matter of law. Thus, petitioners have not presented a question that merits consideration by this Court.

I. The Decision Below Is Consistent Both with Long-Standing Administrative Practice and with Federal and State Court Decisions Dealing with the Jurisdictional Issue.

A. *The Commission Has Asserted the Authority Involved in the Present Case for Nearly Forty Years and No Court Has Questioned This Assertion of Authority.*

An examination of FCC decisions on the question presented here shows that the Commission has repeatedly asserted jurisdiction over facilities used for both interstate and intrastate service. In a 1938 case, *South-*

[15] Pet. No. 76-332 at 18, 20. (Hereafter "AT&T Pet.").

western Bell Telephone Co.,[16] the carrier argued that the Commission could not exercise authority over the construction of lines entirely between points within Texas because approximately 90% of the traffic over the lines would be intrastate. Setting the pattern that it was to follow in later years, the Commission rejected the suggestions that its jurisdiction was limited to joint facilities used "primarily" for interstate service and that its assertion of authority invaded the jurisdiction of state commissions in violation of Sections 2(b)(1) and 221(b).

In a 1947 decision, *Use of Recording Devices*,[17] the Commission applied this reasoning to resolve a question of jurisdiction over terminal attachments, the precise question involved in this case. In that case, as here, the carriers argued that Sections 2(b)(1) and 221(b) deprive the Commission of jurisdiction over facilities (such as terminal attachments) "which are used for both interstate and intrastate services . . . ." [18] As it had in 1938, the Commission rejected this contention, stating that, since interstate telephone service "requires the use of facilities that are not 'exclusively interstate,'" it had to have jurisdiction over facilities that are used in common for both interstate and intrastate service in order for its regulation of interstate service to be effective.[19]

The Commission repeatedly adhered to this position in the years that followed. Thus, in *Katz* v. *AT&T*,[20] the Commission rejected the telephone company's contention that termination of service over facilities used for inter-

[16] 6 F.C.C. 529 (1938).

[17] 11 F.C.C. 1033 (1947).

[18] *Id.* at 1046.

[19] *Id.* at 1047.

[20] 16 F.C.C. 421 (1951), *rehearing denied*, 43 F.C.C. 1328 (1953).

state and intrastate communication was a matter that should be left to regulation by local agencies:

> "Were the Commission to exercise its jurisdiction only where the telephone facilities in question were exclusively interstate in character, it would result in virtually complete abdication from the field of telephone regulation by the Commission." [21]

The Commission's position remained steadfast in actions subsequent to *Katz*,[22] culminating in the 1968 *Carterfone* decision.[23]

In *Carterfone*, the Commission generalized its earlier exercise of authority over interconnection matters by requiring the carriers to remove from their interstate tariffs all prohibitions against the attachment of noncarrier-supplied apparatus even though the practical effect of this action was to remove such prohibitions in connection with intrastate service as well.[24] *Carterfone* was not

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[21] 43 F.C.C. at 1332 (denying rehearing).

[22] *See Jordaphone Corp.* v. *AT&T*, 18 F.C.C. 644 (1954); *AT&T (Railroad Interconnection)*, 32 F.C.C. 337, 339 (1962); *AT&T (TWX)*, 38 F.C.C. 1127 (1965).

Petitioners attempt to distinguish *AT&T (TWX)* as involving equipment predominantly interstate in use and not pertaining to telephone exchange service. AT&T Pet. at 31 n.43. However, this distinction is clearly groundless since in *Southwestern Bell Tel. Co.*, *supra*, *Use of Recording Devices*, *supra*, and *Katz* v. *AT&T*, *supra*, the Commission had already asserted jurisdiction over facilities that were predominantly intrastate in their use and pertained to exchange service.

[23] 13 F.C.C.2d 420, *reconsideration denied*, 14 F.C.C.2d 571 (1968). As early as *Carterfone*, the Commission made clear that its jurisdiction extended to a wide range of terminal devices: "In view of the unlawfulness of the tariff there would be no point in merely declaring it invalid as applied to the Carterfone and permitting it to continue in operation as to other interconnection devices." *Id.* at 425.

[24] Petitioners attempt to distinguish *Carterfone* and the Commission's earlier decisions on the ground that the FCC's assertion of jurisdiction in those cases was limited to use of the equipment

appealed by the carriers or the states, and in its post-*Carterfone* decisions, the Commission continued to assert jurisdiction in circumstances where both interstate and intrastate service was necessarily involved.[25] Its most recent decision in this area, rejecting the argument that Section 2(b)(1) deprives it of jurisdiction over charges for dial restoration panels [26] used for intrastate as well as interstate communication, was affirmed by the District of Columbia Circuit.[27]

As the foregoing discussion demonstrates, the declaratory ruling in the present case is simply one more link

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for interstate and foreign operations. AT&T Pet. at 31 n.43. The distinction is spurious, for in the present case, as in *Carterfone* and its earlier decisions, the Commission has asserted jurisdiction only over equipment used for interstate service, and the states have been precluded only from acting in ways that would directly frustrate exercise of that jurisdiction. Although this may have a practical impact upon state regulation of intrastate service, the same was true in *Carterfone* and the earlier cases. There, as here, the equipment at issue was attached to facilities used for intrastate as well as interstate service, and the Commission's order had, of necessity, a direct impact upon intrastate uses of the equipment. Thus, *Carterfone*, for example, resulted in the filing of new state tariffs to conform to the FCC's ruling applicable to interstate tariffs.

[25] Thus, in *Fallon Travelodge*, 14 F.C.C.2d 972 (1968), the Commission, on the basis of *Use of Recording Devices*, *supra*, and other decisions, considered a complaint for delay in providing certain special purpose terminal equipment, even though the equipment could be used interchangeably to make interstate and intrastate calls. And in *Johnson*, 18 F.C.C.2d 679 (1969), the Commission considered a complaint for wrongful discontinuance of service despite arguments that it lacked jurisdiction because the carrier's action involved termination of intrastate telephone exchange service as well as interstate service.

[26] Dial restoration panels, which are installed at control centers and sites within the country's Air Defense Command, are terminal facilities which permit quick manual restoration of interrupted communication circuits by rerouting transmissions.

[27] *United States Dep't of Defense* v. *General Tel. Co.*, 38 F.C.C.2d 803, *review denied*, FCC 73-854 (1973), *aff'd per curiam sub nom. St. Joseph Tel. & Tel. Co.* v. *FCC*, 505 F.2d 476 (D.C. Cir. 1974).

in an unbroken chain of decisions by the Commission asserting jurisdiction over facilities used for interstate communication, even though the same facilities are used, to a great degree, for intrastate communication as well.[28] The petitioners' challenge to the FCC's declaratory ruling is thus nothing more than a rearguard effort to oust the Commission of jurisdiction to which it has consistently laid claim for almost forty years.[29]

As shown below, apart from the actions that precipitated the declaratory ruling in this case, state authorities have acquiesced in this assertion of Commission jurisdiction. Moreover, no federal or state court has questioned this assertion of authority by the Commission. To the contrary, the courts have taken positions in support of the Commission's jurisdiction in this area. Thus, in *Hush-A-Phone Corp.* v. *United States*,[30] the District of Columbia Circuit required the Commission to investigate the reasonableness of a carrier tariff restriction prohibiting the attachment of devices that were not furnished by the telephone company. More recently, that same court affirmed the Commission's determination in *United States Department of Defense* v. *General Telephone Co.*,[31] that the terminal equipment used jointly for interstate and

[28] Such jurisdiction has been asserted not only in connection with the attachment of terminal equipment (*see Use of Recording Devices, supra; Jordaphone Corp.* v. *AT&T, supra; AT&T (Railroad Interconnection), supra; Carterfone, supra*), but also with respect to the interstate service furnished through the use of such equipment (*see Katz* v. *AT&T, supra; Fallon Travelodge, supra; Johnson, supra*) and the rates charged for the use of such equipment in interstate service (*see AT&T (TWX), supra; United States Dep't of Defense* v. *General Tel. Co., supra*).

[29] In light of this consistent pattern of Commission decisions asserting jurisdiction, it is difficult to understand the petitioners' unsubstantiated reference to "the FCC's own prior precedents to the contrary . . . ." AT&T Pet. at 31.

[30] 238 F.2d 266 (D.C. Cir. 1956).

[31] 38 F.C.C.2d 803, *review denied*, FCC 73-854 (1973).

intrastate communication service in that case was subject to FCC jurisdiction.[32] Similarly, the only state court that appears to have considered the question has also upheld the Commission's primacy in regulation of interconnection equipment.[33]

In short, far from creating a state of confusion, the decision below is fully consistent with a long-standing pattern of administrative practice—supported by the courts[34]—upholding the authority that the Commission reaffirmed in its declaratory ruling. The Commission's

[32] *St. Joseph Tel. & Tel. Co.* v. *FCC*, 505 F.2d 476 (D.C. Cir. 1974).

[33] *Sherdon* v. *Dann*, 193 Neb. 768, 229 N.W.2d 531 (Neb. Sup. Ct. 1975). In that case, the Nebraska Supreme Court overturned a Nebraska Public Service Commission order which prohibited interconnection when no state authorization had been obtained. In so doing, the court explained:

> "If each state were to be free to establish its own rules governing interconnection for the purposes of intrastate services, uniform, non-discriminatory interstate services throughout the country would be made difficult, if not impossible." *Id.* at 536.

[34] *Kitchen* v. *FCC*, 464 F.2d 801 (D.C. Cir. 1972), relied on by petitioners, AT&T Pet. at 28, does not question the jurisdiction that the Commission has asserted here. *Kitchen* involved an effort by environmentalists to prevent the construction of a building to house local exchange switching equipment by requiring the FCC to assume jurisdiction and file a statement under the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* The Commission declined to require pre-construction certification of the building under Section 214 of the Act, 47 U.S.C. § 214, which prohibits carriers from constructing a "new line" without first securing a certificate of public convenience and necessity from the Commission. In a *per curiam* opinion, the court declined to compel the Commission to require Section 214 certification in these circumstances. It noted that a substantial question existed as to whether the building at issue could be considered part of a "line" within the meaning of Section 214. In effect the case involved what was essentially a local zoning dispute that had already been the subject of extensive hearings before appropriate state agencies and the resolution of which was not, in any event, found to have any effect upon communications facilities used in interstate service.

decision to exercise this authority in order to achieve the objectives of the Act is, under well-settled principles of law, entitled to the greatest deference.[35]

B. *The States Have Historically Deferred to the Commission's Authority in this Area.*

Contrary to petitioners' assertions, the Commission's declaratory ruling does not represent an invasion of what has long been a regulatory preserve of the states. For one thing, the history of state regulation in this area is hardly what petitioners would have it appear. Petitioners list several decisions ostensibly establishing a history of state regulation.[36] Of the fourteen decisions listed, more than half predate enactment of the Communications Act and thus shed no light on the division of regulatory authority that Congress established in the Act. The remaining decisions are no more supportive of petitioners' position, for an examination of state regulatory practices subsequent to 1934 reveals a pattern of deference by the states to tariffs filed by the utilities in conformity with interstate tariffs previously filed with the FCC. In effect, state regulatory agencies, recognizing the need for uniformity of regulation and the primacy of federal authority, have deferred to the Commission-sanctioned tariffs.[37]

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[35] *See United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968); *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *American Trucking Ass'ns* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397 (1967); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943); *General Tel. Co.* v. *FCC*, 413 F.2d 390, 401 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969).

[36] AT&T Pet. at 21 n.33.

[37] After the Commission's order in *Carterfone*, for example, AT&T sought and received from the Commission an extension of time within which to file *Carterfone*-implementing tariff modifications in each state to make the state tariffs consistent with its interstate and foreign tariffs. 15 F.C.C.2d 31 (1968). Similarly, after the Commission's order in *Hush-A-Phone Corp.*, 22 F.C.C. 112 (1957),

Because of this deference, the Commission, which has long asserted jurisdiction over facilities used jointly for interstate and intrastate service, did not, until recently, find it necessary specifically to preempt particular aspects of state regulation of interconnection. Thus, the fact that the Commission did not preempt state action in this area before its ruling in this case does not reflect a recognition of primary state authority and does not foreclose a succeeding exercise of federal authority in an area where that authority is paramount.[38] Accord-

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AT&T filed amendments to all of its state tariffs in order to make them consistent with the interstate filings. Indeed, one of the more recent cases cited by petitioners in support of their position that the states have regulated terminal facilities in a plenary fashion recognizes the secondary role actually played by the states. In *Peters Sunset Beach, Inc.* v. *Northwestern Bell Tel. Co.*, 60 P.U.R.3d 363, 367 (Minn. R.R. & Whse Comm'n 1965), *aff'd.* Minn. Dist. Ct. 8th Dist., Case No. 8529 (1966), a telephone service subscriber challenged a state tariff prohibiting interconnection of a private intercommunications system. Commenting on that tariff, the state commission stated:

> "It was modified in 1958 by the addition of Paragraph 'a,' because of the decision in *Hush-A-Phone Corp.* v. *United States* (1956), and subsequent proceedings of the Federal Communications Commission. These tariffs which cover intrastate telephone service are substantially identical to comparable tariffs filed by respondent and the other companies of the Bell System with the Federal Communications Commission which cover interstate telephone service." (Citations omitted.)

[38] "Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise." *FTC* v. *Bunte Bros.*, 312 U.S. 349, 352 (1941).

Petitioners argue that "state and local control over matters long regulated at that level should not be superseded without the clearest expression of Congressional intent." AT&T Pet. at 35. Their argument, however, assumes that state and local control in the interconnect area has been exclusive of federal control, when in fact, it is concurrent jurisdiction that has long been exercised. Thus petitioners overlook the fact that whatever may have been the extent of state regulation, that regulation, from the enactment of the Communications Act until now, has been entirely harmonious with, and indeed, deferential to, federal interstate requirements. Under the Act, it could not have been otherwise. Accordingly, though a contrary

ingly, when state policies raised the prospect of direct conflict with federal policies in the field of interconnection, the Commission properly resolved the conflict in accordance with the most rudimentary principles of federal supremacy.[39]

II. The Decision Below Correctly Upheld the Commission's Determination that its Statutory Jurisdiction Over Interconnection of Terminal Equipment Used for Interstate Telephone Service Precludes Conflicting State Action that Would Frustrate Achievement of Federal Policy in the Area.

As set forth in Section 1 of the Act, the FCC was created for the purpose of

> "regulating interstate and foreign . . . communication by wire and radio so as to make available, so far as possible, . . . a rapid, efficient, Nation-wide, and world-wide . . . communication service with adequate facilities at reasonable charges . . . ." [40]

assertion of state authority must yield to federal requirements, *see Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963); *Head* v. *New Mexico Bd. of Examiners*, 374 U.S. 424, 430 (1963), the authority of states to act in the area of interconnection has not been superseded. Rather, states have been limited to implementing policies that are not inconsistent with federal policy.

[39] It is well settled that where there is a conflict between federal and state regulatory policies such that enforcement of both would impair superintendence of the field by the federal agency and frustrate achievement of the objectives of congressional legislation, the state policy must yield, so long as the federal agency is acting within its jurisdiction. *See Florida Lime & Avocado Growers, Inc.* v. *Paul, supra; Head* v. *New Mexico Bd. of Examiners, supra; id.* at 444-45 (Brennan, J., concurring). This is precisely such a case, for the conflict between a state policy *prohibiting* interconnection of customer-provided equipment and a federal policy *requiring* that interconnection of such equipment be permitted could hardly be more clear-cut.

[40] 47 U.S.C. § 151. The Act was passed in response to what was perceived as a "vital need for one commission with unified jurisdic-

Although Congress could not foresee all developments in the communications field, it clearly intended to grant the Commission the extensive authority required for effective regulation, including such authority as was necessary to accommodate future developments.[41]

To achieve these objectives, Section 2(a) of the Act,[42] grants the Commission regulatory authority over "all interstate and foreign communication by wire or radio . . . ." Section 3 of the Act makes clear that this authority extends to "all instrumentalities, facilities, apparatus, and services . . . incidental to [interstate or foreign communication]." [43] This broad grant of authority is co-extensive with the comprehensive purposes of the Act. Thus, regulation of the interconnection of terminal facilities used for interstate communication service is plainly encompassed within the basic jurisdictional grant of Sections 2(a) and 3.

To be sure, Congress did make certain exceptions to the exercise of the Commision's broad jurisdiction. In particular, Section 2(b)(1) of the Act withholds from the Commission "jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication

tion over all . . . methods of communication . . . ." S. Rep. No. 781, 73d Cong., 2d Sess. 1 (1934). The Senate Report stated:

> "Under existing provisions of the Interstate Commerce Act the regulation of the telephone monopoly has been practically nil. This vast monopoly which so immediately serves the needs of the people in their daily and social life must be effectively regulated." *Id.* at 2.

[41] *See United States* v. *Southwestern Cable Co.*, 392 U.S. at 172-73; *General Tel. Co.* v. *FCC*, 413 F.2d at 398.

[42] 47 U.S.C. § 152(a).

[43] *Id.* § 3(a), (e), (f).

service by wire or radio of any carrier . . . ." [44] Similarly, Section 221(b) denies the Commission

> "Jurisdiction, with respect to charges, classifications, practices, services, facilities or regulations for or in connection with . . . telephone exchange service, . . . even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority." [45]

While these provisions do impose certain limitations on the Commission's jurisdiction, they do not, either explicitly or implicitly, deprive the Commission of jurisdiction to regulate equipment used directly for interstate telephone service even though such equipment may be used for intrastate service as well.

Petitioners contend otherwise. But their position not only reads into the Act a restriction that the statutory language does not support; [46] it also requires a construction that would hopelessly impair the Commission's ability to discharge its responsibilities under the Act—particularly its obligation to insure the availability of "adequate facilities at reasonable charges." [47] By denying the

[44] *Id.* § 152(b)(1).

[45] *Id.* § 221(b).

[46] If petitioners were correct in asserting that Section 2(b)(1) deprives the Commission of jurisdiction over any facility used for intrastate as well as interstate communication service, Section 221(b)'s reservation to the states of jurisdiction over facilities used in connection with telephone exchange service would have been superfluous since the jurisdictional limitation would already have been established by Section 2(b)(1).

[47] 47 U.S.C. § 151. As this Court has observed, " 'in the absence of compelling evidence that such was Congress' intention . . . [courts should not] prohibit administrative action imperative for the achievement of an agency's ultimate purposes.' " *United States* v. *Southwestern Cable Co.*, 392 U.S. at 177 (quoting *Permian Basin Area Rate Cases*, 390 U.S. at 780).

Commission's authority over the bulk of equipment used for interstate service, petitioners' construction of the Act would raise the distinct possibility that customer-provided terminal attachments approved (or required) for use in one state would not be compatible with comparable equipment approved (or required) for use in other states. It was precisely such a situation that Congress sought to avoid when it created the FCC. Thus, as the court below concluded, the Commission must retain jurisdiction

> "to determine what terminal equipment can safely and advantageously be interconnected with the interstate communications network and how this shall be done." [48]

Reading the Act to preserve Commission jurisdiction over facilities used jointly for interstate and intrastate service gives proper recognition to the effect of Sections 2(b)(1) and 221(b) and is consistent with the legislative history. Although Sections 2(b)(1) and 221(b) do reserve certain aspects of telephone regulation to the states, they were not intended to oust the FCC of jurisdiction necessary for the effective discharge of its statutory responsibilities. Rather, as the court below explained,

> "the purpose of Section 2(b) is to restrain the Commission from interfering with those essentially local incidents and practices of common carriage by wire that do not substantially encroach upon the administration and development of the interstate telephone network." [49]

[48] 537 F.2d at 793.

[49] *Id.* at 794 n.6. The fact that the jurisdictional limitations of Sections 2(b)(1) and 221(b) are made subject specifically to Section 301, 47 U.S.C. § 301, is viewed by petitioners as confirmation that the Section 2(b)(1) and 221(b) restrictions override every other jurisdictional grant in the Act. AT&T Pet. at 27-28. This view is patently incorrect. Section 301 generally establishes the

Section 2(b)(1) does not sanction state actions that frustrate implementation of federal policies that have been formulated in the direct discharge of the Commission's statutory responsibilities to insure effective and efficient interstate service.[50]

Contrary to petitioners' contention, the portion of the legislative history which reflects concern that the so-called "*Shreveport*" decision[51] not be extended to the

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licensing requirement for radio communication, an area in which, as petitioners themselves recognize, Congress intended FCC authority to extend "even beyond interstate communication to intrastate radio transmission that may merely interfere with interstate uses . . . ." AT&T Pet. at 33. Thus, the overriding effect of Section 301 on Sections 2(b)(1) and 221(b) means simply that operation of all radio equipment, even radio equipment *used solely for intrastate service*, falls within FCC regulatory jurisdiction, whereas wire telephone equipment used solely for intrastate service does not. The FCC decision at bar, of course, does not seek to exert jurisdiction over equipment used solely for intrastate service.

[50] The purpose of Section 221(b) is to preclude the assertion of FCC jurisdiction over charges or facilities "for or in connection with . . . telephone exchange service" when the only basis for federal interest is that "a portion of such exchange service constitutes interstate or foreign communication . . . ." The legislative history makes clear that Section 221(b) was enacted to deal with a specific and narrow problem arising from the fact that a few metropolitan areas in the United States straddle state lines and the local exchanges in such areas serve portions of more than one state. Since Congress wished to preserve state authority over purely local exchange service, it provided in Section 221(b) that such service remains in state, rather than federal, control even though the service is literally interstate in nature. *See* 78 Cong. Rec. 10314 (June 2, 1934) (remarks of Congressman Rayburn); 78 Cong. Rec. 8823, 10012 (May 15 and June 9, 1934) (remarks of Senator Dill). Contrary to the view expressed by Judge Widener, dissenting below, Section 221(b) was never intended to remove the FCC's jurisdiction, as granted in Section 2(a), over facilities used to communicate with out-of-state points *beyond* the boundaries of the telephone exchange as well as within those boundaries.

In view of the clear teaching of this history it is not surprising that in its oral argument before the Commission in this case AT&T abandoned any reliance upon Section 221(b). Trans. at 102-03.

[51] *Houston, E. & W. Texas Ry.* v. *United States*, 234 U.S. 342 (1914).

field of communications is wholly consistent with the reading of the Act by the Commission and the court below. *Shreveport* was viewed as sanctioning an exercise of federal authority over intrastate rail rates predicated solely upon the *indirect effect* that those rates might have on interstate rail transportation.[52] In contrast to *Shreveport*, in the present case the Commission has asserted authority to regulate only facilities used *directly* in interstate communication service and to preclude conflicting state policies that would impair FCC regulation of such service. Thus, the Commission's action here does not constitute an assertion of jurisdiction comparable to that involved in *Shreveport*.

In sum, reading the Act so as to permit the exercise of FCC authority over equipment used in common for interstate and intrastate communication service gives proper recognition to all the statutory language, serves the purposes of the Act and is fully consistent with the legislative history. Petitioners' opposite view is an effort to parlay the limited purposes of Sections 2(b)(1) and 221(b) into an emasculation of the regulatory powers specifically granted the Commission to achieve the objectives clearly stated by Congress in the Act itself.[53] The Act must not be read to withdraw with one hand the authority that it grants with the other—authority necessary to assure the compatibility demanded by an efficient and effectively functioning nationwide communications system.

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[52] *See Hearings on H.R. 8301 Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 134, 136, 145 (1934); *Hearings on S. 2910 Before the Senate Comm. on Interstate Commerce*, 73d Cong., 2d Sess. 153, 155, 156, 179 (1934).

[53] "Since provisos and exceptions in statutes are intended to restrain or except that which otherwise would be within the scope of the general language, they must be strictly construed and limited to objects fairly within their terms." *Rochester Tel. Corp.* v. *United States*, 23 F. Supp. 634, 636 (W.D.N.Y. 1938), *aff'd*, 307 U.S. 125 (1939) (construing Section 2(b)).

CONCLUSION

For the reasons stated above, this Court should not issue a writ of certiorari to review the judgment of the court below.

Respectfully submitted,

JOSEPH E. KELLER
WAYNE V. BLACK
LARRY S. SOLOMON
Keller & Heckman
1150 17th Street, N.W.
Washington, D.C. 20036
Counsel for American Petroleum Institute

J. ROGER WOLLENBERG
DAVID R. ANDERSON
NEIL J. KING
Wilmer, Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 20006

J. GORDON WALTER
Old Orchard Road
Armonk, New York 10504
Counsel for International Business Machines Corporation

HERBERT E. MARKS
STEPHEN R. BELL
Wilkinson, Cragun & Barker
1735 New York Avenue, N.W.
Washington, D.C. 20006
Counsel for Remote Processing Services Section of the Association of Data Processing Services Organizations, Inc. (ADAPSO)

EDWIN B. SPIEVACK
IAN D. VOLNER
Cohn & Marks
1920 L Street, N.W.
Washington, D.C. 20036
Counsel for Telerent Leasing Corporation, North American Telephone Association, et al.

JOSEPH M. KITTNER
EDWARD P. TAPTICH
McKenna, Wilkinson & Kittner
1150 17th Street, N.W.
Washington, D.C. 20036

JOHN S. VOORHEES
Howrey & Simon
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20036
Counsel for Computer and Business Equipment Manufacturers Association

MICHAEL H. BADER
KENNETH A. COX
WILLIAM J. BYRNES
Haley, Bader & Potts
1730 M Street, N.W.
Washington, D.C. 20036
Counsel for MCI Telecommunications Corporation

HERBERT E. FORREST
Steptoe & Johnson
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

THORMUND A. MILLER
RICHARD S. KOPF
7 Southern Pacific Building
One Market Plaza
San Francisco, Calif. 94105
Counsel for Southern Pacific Communications Company

CHARLES M. MEEHAN
Keller & Heckman
1150 17th Street, N.W.
Washington, D.C. 20036
Counsel for Utilities Telecommunications Council

November 24, 1976